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No. 40

**In the Supreme Court of the
United States**

October Term, 1961

DAVID D. BECK,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REHEARING

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TABLE OF CONTENTS

	<i>Page</i>
PETITION FOR REHEARING	1
GROUND FOR PETITION	1
DISCUSSION	3
Denial of Equal Protection to Petitioner by Decision of this Court	3
Conduct of Prosecuting Attorney in Grand Jury Proceedings	4
COMBINED EFFECT OF ERRORS IN GRAND JURY PROCEDURE	7
CERTIFICATE	9

INDEX OF CASES

	<i>Page</i>
<i>Mooney v Holohan</i> , 294 U.S. 103 (1935)	6
<i>State v Guthrie</i> , 185 Wash. 464, 56 P2d 160	3

STATE STATUTES

RCW 4.04.010	3
RCW 4.28.030	3, 4
RCW 4.28.100	4

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PETITION FOR REHEARING

David D. Beck hereby petitions this Court for a rehearing in the above entitled case,

OR in the alternative, petitions that the case be returned to the Supreme Court of the State of Washington for determination by that Court whether petitioner raised the question of equal protection in the courts of that State;

OR, in the alternative, that the case be returned to the Supreme Court of the State of Washington to determine whether the four judges who urged that the indictment be dismissed were in agreement with the other four judges on the question of denial of petitioner's Motion for Continuance and Change of Venue.

The grounds for this petition are:

1. This Court—and not the Courts of the State of Washington—has denied to petitioner the equal pro-

tection of law and has adopted a rule which will deny equal protection of law to others similarly situated.

A. The rule adopted by the Court denies equal protection in grand jury proceedings to persons not held in custody; and the Court's decision of this point will affect not only criminal procedure in the State of Washington but in other States which have statutes and rules similar to the Revised Code of Washington, § 10.28.030.

B. It is incontrovertible that this highly significant point was raised in the Courts of Washington as well as in this Court. (Quotations from Briefs and Opinions are set forth in the Appendix hereto). The question of equal protection was raised in the Petition for Certiorari herein and was argued at length in Petitioner's Brief; and the fact that this point was raised was never questioned (and in fact was conceded) so that petitioner has had no opportunity to demonstrate to this Court that the point was raised in the Washington Courts as well as in this court.

2. The conduct of the prosecuting attorneys in the grand jury proceedings should have been considered in the aspect of its probable effect upon the grand jury appraisal of witnesses, rather than with reference merely to whether a witness changed his testimony.

3. The Court's conclusion that petitioner received a trial by an impartial petit jury is based upon erroneous facts and a misconception of the attitude of four members of the Supreme Court of the State of Washington.

DISCUSSION

Denial of Equal Protection to Petitioner by Decision of this Court.

In the State of Washington prior to the decision of the Court:

A. A person *in custody* was entitled to be present at the impanelment of a grand jury and interrogate prospective grand jurors or suggest questions for interrogation, and challenge individual grand jurors for bias or prejudice. RCW §10.28.030.

B. A person *not in custody* was entitled to have the trial court exercise its opinion at the time of impanelment of the grand jury concerning the state of mind of the prospective grand juror. RCW §10.28.030.

C. With respect to persons *not in custody* it was the responsibility of the trial court to insure that impartial jurors were secured. *State v. Guthrie*, 185 Wash. 464, 56 P. 2d 160; RCW §4.04.010.

The 4-4 opinions of the State of Washington did not change the law, but left petitioner convicted without a determination, by either of the above methods, that the grand jurors were unbiased.

In the State of Washington, under the decision of this Court petitioner was denied equal protection on the theory that:

A. One *in custody* still has the right to attend grand jury proceedings and interrogate prospective grand jurors or submit questions for interrogation and to interpose challenges for bias. RCW §10.28.030.

B. But with respect to persons *not in custody* the

principle so firmly and expressly enunciated in *Guthrie* is no longer applicable and,

1. It is no longer the duty of the trial court to insure that unbiased and impartial grand jurors will be secured.

2. One *not in custody* has the burden of proving by a demonstrable reality that one or more of the grand jurors were prejudiced against him, despite the fact that he was not present at the impanelment and had no notice of the time and place thereof, and is not entitled to the grand jury transcript, and is not entitled to interrogate members of the grand jury either before or after the deliberations of the grand jury. RCW §10.28.100.

3. Where, as to persons *not in custody*, the trial court fails to make a determination as to bias and prejudice either at the time of impanelment of the grand jury or thereafter upon motion to dismiss, this Court years later and in a different atmosphere can make such a determination (basing its decision upon such things as the occupation of the grand jurors), whereas, as to persons *in custody*, such a decision is required to be based upon the opinion of the trial court at the time of impanelment of the grand jury. RCW §10.28.030.

The Appendix to this Petition includes quoted material from the Record which demonstrates that this question was raised and considered in the courts of the State of Washington.

Conduct of Prosecuting Attorneys in Grand Jury Proceedings.

Assuming that it is a matter of any concern to the court, this is not a case where the record clearly

shows the guilt of the defendant and reversal is sought purely on technical grounds.

In this case, one who reads the records of the grand jury proceedings and trial proceedings will at once perceive that the conviction, aside from procedural error, was based upon tenuous facts and if the matter be approached realistically that the petitioner was probably innocent.

It is manifest that he had nothing to do with the sale of the automobile, that he was out of the City at the time, and that the funds were erroneously deposited in his bank account. The grand jury witness who was mistreated by the prosecutors testified that petitioner had returned to the union a sum in excess of the amount involved in the sales transaction (as well as that involved in other transactions) and that the money was kept in a safe deposit box to which petitioner had no access. When called upon to do so, the witness produced the money. Another witness testified at the trial that prior to the indictment he had examined the safe deposit box and had seen a large amount of currency in the box.

Petitioner, at the trial, did not testify with respect to this matter. It must be apparent that had he done so, violations of other statutes, such as the Labor-Management Relations Act, on the part of the union might have been disclosed, but such conduct does not constitute embezzlement.

Under these circumstances it was vital that the prosecutors not interfere with the function of the grand jury. It was the grand jury's function and theirs alone, to assess the credibility of the witnesses. Who can say whether, absent the interference of the prosecutors, the grand jury would not

have believed the witness? If they had believed the witness there would have been no indictment and no conviction.

The question of the conduct of the prosecutors should be viewed not from the point of view of whether the witness "stuck to his story" but from the point of view of whether the assertions of the prosecutors concerning the credibility of his testimony might have influenced the grand jury.

Misconduct of a prosecuting officer is most certainly a matter within the purview of the due process laws of the Fourteenth Amendment. *Mooney v. Holohan*, 294 U.S. 103 (1935). The conduct of the prosecutors in this case would surely have been condemned in the presence of a court. We submit that it should not be countenanced merely because it occurred in the secrecy of the grand jury room.

The decision of the Court on this point not only has resulted in a indictment of a man who was probably innocent but establishes dangerous standards of conduct for further cases in State proceedings.

COMBINED EFFECTS OF ERRORS IN GRAND JURY PROCEDURE

This Court has treated each of the petitioner's contentions concerning the grand jury procedure as if it were one single contention of error, without relationship to the additional contentions of error, despite the fact that the questions certified contain related subheadings (see Petition for Writ of Certiorari, p. 4-7). It is Petitioner's contention that the alleged error in the grand jury impanelment and proceedings should be considered in the light of their total effect or potential danger, just as a conspiracy must be viewed in its entirety and not by an examination of its separate parts. See *Swift & Co. v. United States*, 196 U. S. 375 (1904).

Thus, in this case, the decision as to whether the grand jury was a valid accusatory body should be made not solely upon the question of whether the grand jury consisted of persons of diverse occupations, or solely upon the question of whether the conduct of the prosecutors did not cause a witness to change his testimony. The real question is: was the grand jury a valid accusatory body in view of the combined facts that (1) it was subjected to unprecedented hostile publicity against petitioner, to the degree that realism compels at least some presumption of bias; (2) no attempt was made by the trial court to determine the effect of the publicity, despite its obligation to do so under existing Washington law;* (3) reference was made by the

*The suggestion by this Court that a direction by the trial court to disregard petitioner's claim of privilege would have added "fuel to the flames" establishes an incorrect principle. Such directions are the best and only remedy which the law provides when inadmissible facts reach the knowledge of the fact-finding body.

trial court to accusations made by a Senate Committee; (4) there was co-operation between representatives of the Senate Committee and the prosecuting officials; (5) and there was misconduct on the part of the prosecutors, possibly inadvertent or resulting from irritation, which was calculated to destroy the credibility of a witness whose testimony, if believed by the grand jury, would have completely exculpated petitioner.

It is the combined effect of this and other conduct of which petitioner complains, and it is for these reasons that we submit that the Court should have decided the certified question which it did not decide—namely, whether petitioner was entitled to a fair grand jury. If petitioner was entitled to a fair grand jury, the determination of this question would clearly have to be based upon a consideration of the potential effect of all of the grand jury proceedings considered together. The Court did not treat the problem in this manner.

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CERTIFICATE

The undersigned, an attorney of this Court,
hereby certifys that this PETITION FOR RE-
HEARING is based upon reasonable grounds and
is not interposed for the purpose of delay.

CHARLES S. BURDELL